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National Association
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TESTIMONY BEFORE THE U.S. SENATE RULES COMMITTEE

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Testimony of Hon. Todd Rokita, Indiana Secretary of State
Before the U.S. Senate Rules Committee
Immediate Past President, National Association of Secretaries of State

Chairman Feinstein, Ranking Member Bennett, and Rules Committee Members, I want to thank you on behalf of the members of the National Association of Secretaries of State for inviting me to testify before you today on S.3212 the Bipartisan Electronic Voting Reform Act of 2008. My colleagues and I are very grateful for your commitment to engaging our association on the issues that come before you and we always appreciate the opportunity to testify at these hearings, both from an organizational standpoint and from an individual perspective.

As an aside, NASS just concluded its annual summer conference on Monday. The members of our Election Committee were pleased to hear from your Chief Elections Counsel, Veronica Gillespie. She did her usual outstanding job. We truly appreciate the working relationship we have with her and the rest of the committee staff on both sides. I also want to add that we have new leadership for the coming year; I passed the gavel as NASS President over to my colleague and good friend Pedro Cortés, Pennsylvania Secretary of State.

NASS Approach to Federal Legislation

To begin my testimony, I want to talk about NASS's approach to federal legislation.

Back in February of 2007, the membership adopted some guidelines that we felt were important when developing and considering federal legislation that impacted the office of the Secretary of State – or in the case of my colleagues in Utah, Alaska and Hawaii, the Lieutenant Governor. We believe that our federal and state governments must work in cooperation to serve the citizens of the United States. To facilitate the appropriate balance for an equal and effective partnership, NASS members agreed that:

(1) Members of Congress should respect our country's legal and historical distinctions in federal and state sovereignty and avoid preemptions of state authority when drafting federal legislation.

Secretaries of State were grateful for the approach adopted during the drafting of the Help America Vote Act of 2002, which was "tell us what you want to accomplish, don't tell us how to accomplish it". That same approach appears to have been taken in drafting S.3212. For example, states must conduct a post election audit, but the language doesn't include mandates as to *how* those audits or *when* those audits must be conducted. Chair Feinstein and Ranking Member Bennett, we are grateful for your sensitivity to issue of pre-emption.

(2) Our second guideline was that federal legislation should include a reasonable timeframe for implementing state requirements or programs.

We have learned many lessons from the Help America Vote Act. As a result, we have some concerns about S.3212, because it requires independent verification and audit procedures to be in place by 2012, with a waiver until 2014.

Independent verification technology requirements in this legislation reference technology that isn't on the market and frankly, may not even be at the laboratory stage at this point. We have learned just how long it takes to go from concept to design, to standards, to manufacture, to testing, and finally, to certification of voting equipment.

However, I would like to acknowledge the benefit of the funding you have included for the research and development of this new technology. If that money is actually appropriated and disbursed, it would go a long way to making those new technologies a reality.

(3) Our third basic principle on federal legislation states that any bill which affects the office and duties of the Secretaries of State should be drafted with input from NASS, or a representative sample of the Secretaries of State who would be impacted by the bill.

As I mentioned earlier, elections counsel in both Chair Feinstein's office and Ranking Member Bennett's office has always been excellent about communicating with NASS staff and members. We are eager to participate in meetings, to provide input on legislative drafts and to testify before you.

(4) Our fourth guideline stipulates that federal legislation requiring changes to state laws or regulations should include full funding to support those changes.

Full funding for implementing federal mandates is imperative and often elusive. We also understand the challenges faced when trying to put a realistic cost estimate on some of these mandates. Because states are organized differently and elections administration responsibilities have and always will be shared between state and local government, coming up with a number that is sufficient is a challenge.

What I can tell you is that the Task Force you have established in this legislation is an interesting approach and could provide very useful and beneficial information on the costs associated with this bill.

(5) Finally, NASS members believe that federal legislation should not curtail state innovation and authority solely for the sake of creating uniform methods among the states. All legislation should grant states maximum flexibility in determining methodologies for properly and effectively carrying out the duties of Secretaries of State, including the protection of voting rights.

From our initial review, we can tell that S. 3212 was written with this principle in mind. The fact that you don't mandate a paper-only solution for voter verification, the fact that states must identify THEIR contingency plans in the state plan and THEIR poll worker education programs and recruitment plans and THEIR chain of custody procedures recognizes that while all of these issues are vital to a well run election, they are unique to each state. My colleagues and I share practices and programs all the time, but we take bits and pieces and we have to customize them for our state's citizens and laws.

Overall, much of the language in S.3212 is compatible with the NASS principles of federal legislation. Endorsements or opposition will come, if it all, from individual members of our organization, not from NASS as a body.

And with that I will now discuss my perspective as Indiana's chief election official.

Again let me commend each of you for your attention to improving the election process in America and would remind you that the states have worked hard to implement significant improvements to election administration and technology since the passage of the Help America Vote Act of 2002 (HAVA). As the Indiana Secretary of State, I have worked closely with our state's local election administrators since taking office and believe some of my observations on the proposed legislation may be helpful in your deliberations.

Voter Verified Paper Audit Trails

Sixty percent of Hoosiers vote exclusively on Direct Record Electronic (DRE) voting systems, and almost ninety percent have at least one DRE machine available in their precinct to meet HAVA's accessibility requirement. DRE voting technology has been employed by some counties in the state for over 20 years. During this time, there has not been any identifiable instance of manipulation of these voting machines. There are many safeguards in place that act to prevent such acts, and contrary to the belief of some, DRE systems are highly auditable. There are no VVPAT devices certified for use in Indiana.

Paper-based systems are not the only solution to holding fair and accurate elections. To illustrate this, I would like to describe a situation voters in an Indiana county experienced this past May. During the Presidential Primary Election, this county had the misfortune of running out of Democratic ballots, in spite of heeding my request to provide additional ballots for that election. The county prepared for a 30% increase in voters requesting a Democratic ballot, and in reality there was a 56% increase. This county employs a paper ballot only voting solution using optical scan readers and the Automark® machine. The Automark® is a hybrid machine using both DRE and optical scan technology that still requires a paper ballot. This technology is often used as an answer to the accessibility requirement in HAVA and to address the concerns of some activists who have clamored for a paper ballot as part of their voting experience.

There were reports of registered voters in this county waiting for hours for a ballot, and of many voters leaving the polls and not returning. A judge ordered some precincts in the county to remain open an hour past the scheduled poll closing time. 87 of Indiana's 92 counties purchased at least one Direct Record Electronic (DRE) voting machine for each polling place to meet HAVA's accessibility requirement. The five remaining counties use paper exclusively, by employing optical scan voting systems and the Automark®. The high voter turnout and absence of an alternate voting system, left this county susceptible to the "perfect storm" situation it faced in May with primary voters completely dependent on paper ballots, even its voters with disabilities. Had the county decided to deploy DRE machines in place of the Automark® to meet accessibly standards of HAVA, or even as their primary voting system to be used by all voters, these machines could have

been used for voters to cast their ballots rather than having voters wait for the paper ballots to be delivered or relying on paper at all.

I am not making this point to say that the county made a wrong decision in selecting their voting system, but instead, I am using this situation to illustrate the tough choices that local election administrators have to make in response to federal legislative demands and the wishes of the voters whose opinions are sometimes formed by misrepresentations of voting technology.

The fact of the matter is that there exists no "magic" solution that will automatically and instantaneously yield the "perfect election". The world has yet to witness a perfect election. What every election can and should be, however, is fair and accurate. One of the best ways to facilitate each outcome is to recognize that one way or solution will not work for all jurisdictions and that the people, through their local representatives, are best situated to make the tough choices that will best suit their needs for fairness and accuracy.

To do this, one proposal I intend to make to our General Assembly, is that each county pick a random sample of their precincts and report on items such as: machine functionality, provisional ballot matters, voter grievances, poll worker training and certification, and more that will reflect the readiness and execution of the election. These reports would be collected and issues categorized and reported back out to voters, taxpayers, and the counties so improvements to election administration can be made in all precincts.

Post-Election Audits: Mandatory Recounts?

The type of post-election audit required in the proposed legislation is less of an audit and more of a mandatory recount. Indiana election laws include strict deadlines for canvassing and certifying the vote. Conducting mandatory recounts for federal elections would be highly time consuming and expensive for local and state election administrators. After the last General Election, Indiana conducted candidate-driven recounts in several state-level elections, including US Senate, costing state taxpayers $400,000. On a state-wide scale, the mandatory recounts required in this proposed legislation could include recounts of nine Congressional races, one US Senatorial race, and Presidential race. This has the potential to cost Hoosier taxpayers an estimated ten or eleven times the amount referenced above each federal election. This is a highly unreasonable unfunded mandate by Congress.

Post-Election Audits: Process vs. Votes

As Indiana's Chief Election Official, if audits of elections are conducted, I would like to see the audits concentrate on the process rather than the votes. In Indiana, votes can always be recounted unconditionally on the demand of a candidate or party. However, it's the people and the processes they use that really make up the Election Day experience. Examining the process is also from where the best ideas for improvement on future elections can come.

For example, I want to know if each voter was treated fairly and given every opportunity to cast a ballot for the candidates of their choice. To achieve that goal, my office operates the Hoosier Voter Hotline, a toll-free phone line available to all voters in Indiana to call with questions or grievances

about the election. We attempt to resolve most issues on Election Day while the voter is still at the polls, but in some cases, we can only follow-up with individual counties following the election. The data received is shared with all of the counties and incorporated into future training sessions.

We can all learn from our mistakes, and this is certainly true with election administration. Like a puzzle, many parts must fit together properly to administer an election. As with the incident I explained above, county election administrators sometimes misjudge what is needed for certain parts of the process necessary to conduct an election. The processes that ultimately result in ballot shortages, poll worker shortages, long lines, and machine issues are all auditable items that can be incorporated into future election preparedness measures.

Indiana depends on an army of 30,000 citizens to conduct a statewide election. Like the brave men and women fighting for our freedoms overseas, this citizen "army" is collectively fighting to ensure our right to a fair and accurate election. My office provides training and materials to local election administrators so they can better train our poll workers; however, people make mistakes and I can only hope that those mistakes do not lead to disenfranchisement. For example, I want provisional ballots used as a last resort for voters, rather than used at the first indication of a problem (Indiana encourages its poll workers to attempt to determine if the voter is in the correct precinct, eligible for the "fail-safe" provision, or other measures before challenging the voter and issuing a provisional ballot). This practice, I call it "mainstreaming", allows the voter to vote and have their vote counted on Election Day. I believe it is extremely important that Indiana's election procedures are applied to the best of our ability in precincts throughout the state.

Unfunded and Under-funded Mandates

Unfunded federal mandates passed on to state and local governments are a great burden to taxpayers. Federal legislation that mandates changes to state laws or regulations should include full funding to support those changes. For example, Congress has still not allocated the remaining $600 million appropriated by HAVA and owed to states for the implementation of HAVA – more than $10 million of which is due to Indiana. Not providing funds for implementation of this proposed legislation is a real concern to state and local governments that will incur these costs mandated by Congress. Even with an appropriation, recent history has shown the country's election administrators that receiving federally appropriated funds is not a certainty. Using estimates based on available evidence and reasonable assumptions, Indiana counties would require $33.5 million dollars for VVPAT only – an amount equal to roughly half of the state's total HAVA disbursement to the state to-date.

In Indiana, we have a strong state and local government partnership that has worked extremely well to implement innovative election practices. The proposed legislation contains provisions that would significantly increase costs to state and local governments. Congressional solutions tend to lead to unintended consequences that local election boards must resolve. These lead to the local election boards having to make choices that could lead to cutting corners and magnified problems for voters. Since 2000, Congress has increasingly supported measures that give the federal government more control of election administration functions delegated by the US Constitution to local and state officials. This includes prescribing the manner in which we vote, effectively increasing election

budgets and thus taxes on citizens, requiring additional administrative procedures, and compelling mandatory election recounts.

I certainly appreciate the legislation's author's intent to improve election integrity; however, our county and state officials have worked to tailor similar policies to meet the specific needs of Hoosiers. This work has resulted in fair, accurate elections, and Indiana voters will be best served if these policy decisions remain within the discretion of local administrators.

Now, I urge you to respect the important contributions that state and local governments bring to an effective legislative partnership, and I welcome the opportunity to work with you and your staff to achieve this goal. I believe we can all appreciate that people are at the heart of election administration. We must also appreciate that people will from time to time make mistakes. Although we must always strive for it, perfection should not be the standard for elections mainly because it will not be achieved as long as humans are involved in the process. Our election policies should always bear this in mind and stress fairness and accuracy to the highest possible degree. We have achieved this result in past elections in Indiana through Hoosier innovation and leadership, and we will continue to do the same for future elections.